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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~680~~ 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

BRIEF FOR RESPONDENT BYRON CLARK, JR., AS EXECUTOR, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

JOSEPH C. THOMSON,
LITTLETON FOX,
ANTHONY J. CAPUTO,
Counsel for Respondent,
Byron Clark, Jr., as Executor.



INDEX

PAGE

Statement 1

Question Presented 2

ARGUMENT

POINT I 2

Conclusion 4

CASES CITED

Matter of del Drago, 287 N. Y. 61 at 78 3

Edwards v. Slocum, 287 Fed. 651, affirmed 264 U. S. 61 2

Irving Trust Co. v. Day, 62 Sup. Ct. Rep. 398 3



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LAWRASON RIGGS, JR., Special Guardian, Petitioner, *against* GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee, Respondents.	No. 980

BRIEF FOR RESPONDENT BYRON CLARK, JR., AS EXECUTOR, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

Statement

Lawrason Riggs, Jr., the Special Guardian for certain infant children of the remainderman of the residuary trust created under the will of Josephine del Drago, deceased, has petitioned this Court for a Writ of Certiorari to review a decision of the Court of Appeals of New York State, reversing the determination of the Surrogate of New York County which required an apportionment of the Federal Estate Tax among the persons beneficially interested in the estate. There being no provision to the contrary in the will, the Surrogate made the decree pursuant to Section 124 of the Decedent Estate Law of New York State.

Byron Clark, Jr., the Executor-Respondent herein, has maintained from the inception of this litigation that the determination of the New York Surrogate upholding the constitutionality of Section 124 was correct and now urges the issuance of a Writ of Certiorari so that this matter may be reviewed.

QUESTION PRESENTED

Are Sections 124 of the Decedent Estate Law or 249-t of Article 10-c of the New York State Tax Law in so far as they authorize, require or direct distribution and apportionment of the Federal Estate Tax levied upon the estate of the deceased among the legatees, repugnant to the provisions of the Federal Estate Tax Act of 1926 and amendments thereto and to the uniformity and supremacy clauses of the Federal Constitution and therefore unconstitutional.

ARGUMENT

POINT I

There can be no doubt that the decision of the Court of Appeals of New York State, if permitted to stand, will destroy the right of that state to fix the incidence of the tax imposed by the Federal Estate Tax Law. This right had hitherto been exercised by the State of New York as well as the Commonwealth of Pennsylvania which has a similar statute. As a result of the decision in this case, the statute in Pennsylvania has also been challenged in the courts of that State. The change and uncertainty created by this decision are matters of great concern to attorneys representing taxable estates. A flood of inquiries made to the office of your respondent since the decision herein was rendered attests to the chaos created thereby. In many instances the final disposition of assets has been prevented.

The grounds of unconstitutionality set forth by the majority of the New York court are strained. In this respect, Judge Hough's comment in *Edwards* v. *Slocum*, 287 Fed. 651, affirmed 264 U. S. 61, printed at page 9 of the Petition of the Special Guardian, cannot be repeated too often since it represents the realistic and substantial

approach to the question this Court is asked to review. Although it is the path leading out of the maze of constitutional objections raised by the respondent legatees, the wisdom of the learned Judge's statement was ignored by the majority of the State Court because it constituted pure dicta. (*Matter of del Drago*, 287 N. Y. 61 at 78.) The minority judges took a more practical view when Judge Desmond in the dissenting opinion said at page 82:

> "We need not take time for a careful inquiry as to whether or not these expressions in the federal decisions are dicta. Dicta or not, binding on us or not, they cannot be ignored, particularly when they have been so long regarded as stating the law, and when they agree with the expressed views of the members of Congress and with the logic of the situation. Why should Congress concern itself as to the ultimate resting place of the tax?"

The control of decedents' estates is exclusively a matter for the several states. The recent decision of this court in *Irving Trust Co.* v. *Day*, 62 Sup. Ct. Rep. 398, Advance Sheets of January 13, 1942, decided January 5, 1942, has reaffirmed this right. It seems without question that such control was properly exercised by the State of New York when it declared through Section 124 of its Decedent Estate Law that in the absence of a contrary provision in the will, it would apportion the burden of the federal estate tax among the legatees.

Eight judges have passed on the question in this case. The four constituting the majority of the Court of Appeals held the statute unconstitutional. The other four, namely the three other Judges of the Court of Appeals, including the learned Chief Justice, and the learned Surrogate of New York County, held it to be constitutional. With such diversity of opinion particularly as shown by the lengthy opinions in the highest state court, it is peculiarly proper that this Court should consider the question now upon its initial presentation, rather than await a presentation of this same question in a matter coming to this Court as of right.

CONCLUSION

The respondent Byron Clark, Jr. respectfully requests that this matter be reviewed by this Court and joins in the prayer of the special guardian that a writ of certiorari be issued.

Respectfully submitted,

JOSEPH C. THOMSON,
LITTLETON FOX,
ANTHONY J. CAPUTO,
Counsel for Respondent,
Byron Clark, Jr., as Executor.

Dated: New York, March 14th, 1942.